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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter pursuant to Supreme Court Rules 83.02 and 83.04. Additionally, this Court has jurisdiction under Article V, Section 3 of the Missouri Constitution to hear constitutional challenges to the states laws.

INTRODUCTION

This case is before the Court on Respondent's Application For Transfer from a writ of mandamus entered by the Missouri Court of Appeals for the Southern District. The writ of mandamus ordered Respondent to vacate the relevant portion of an order that would have allowed the disposal of Relator's horses by those who currently are in custody of the animals.

The State's act of seeking amendment to the initial and amended orders issued by Respondent in the case below, presented a novel interpretation and/or application of the provisions of §578.018 R.S.Mo. When Respondent entered the order allowing for the immediate disposal by the humane societies of the impounded horses, Relator was left with no remedy but to seek an emergency writ of mandamus to protect the horses as they represented evidence in the pending criminal action. Additionally, since Relator has not been convicted of animal abuse or neglect, the horses are still his property though subject to the humane societies' lien under the provisions of §430.165.¹

¹ Copies of relevant statutes are found in the Appendix.

STATEMENT OF FACTS

On January 7, 2005 an investigation was began by the Greene County Sheriff's office on a complaint of animal abuse. (Trial Transcript, Volume 1, page 29)² The investigative officer, Deputy Roy Cole, visited the cite of the alleged abuse and wrote a report about his findings. TT., Vol. 1, p. 30. The on-duty detective on on January 7, 2005 was Mr. Mark Hall. TT., Vol. 1, p. 29. Based on Deputy Cole's report, Detective Hall drafted a search warrant³ that was subsequently signed at Respondent's residence the morning of January 8, 2005. TT., Vol. 1, p. 32.

Detective Hall executed the search warrant at Relator's ranch at approximately 1:30 p.m., January 8, 2005. TT., Vol. 1, p. 37. Attending the execution of the search warrant was Detective Mark Hall, Mr. Allen Miller, of the Missouri Humane Society, Dr. Dziuban D.M.V.⁴, and several workers from the humane society.⁵ TT. Vol. 1, pp. 32-33. From 1:30 p.m. January 8, 2005 until approximately 5:00 a.m. January 9, 2005, Detective

1. Hereinafter, cited as "TT, Vol. __, p. __."

³ Trial Exhibit 2. (Hereinafter, trial exhibits are cited as "TE __".

⁴ Dr. Dziuban attended the search after being requested by Ms. Jackie Riveria of the Humane Society of Republic Missouri. TT., Vol 1, p. 116.

⁵ It was estimated that a total of 10-12 people assisted in the execution of the warrant. TT., Vol. 1, p. 65.

Hall, with the assistance of those in attendance, impounded one hundred and twenty-seven (127) horses from Relator's ranch. TT., Vol 1, p. 40. The decision as to whether a horse was going to be impounded was made by Dr. Dziuban. See *infra* at pp. 22-23.

Solely upon the determination of Dr. Dziuban, the complete stock of Relator's horses (127) was impounded.⁶ TT., Vol., p. 40. The decision as to where the horses were to be taken after their impoundment was made by Mr. Miller of the Missouri Humane Society. (Id.). At the direction of Mr. Miller, the horses were divided up with different groups being taken to Mount Vernon Missouri, Carthage Missouri, and Union Missouri. TT., Vol. 1, pp. 88-89.

On February 1, 2005, a disposition hearing was held pursuant to §578.018.1((1) in the Circuit Court of Greene County, Missouri.⁷ The hearing was presided over by Respondent, the Honorable Don E. Burrell. The hearing was reconvened on February 28 and March 1, 2005. During the course of the hearing, a total of twenty-four (24) witnesses testified and well over one hundred (100) individual documents were submitted into evidence. TT., Vol 1, pp. i– viii.

⁶ Four more of Relator's horses were impounded three (3) days later. The record is unclear as to whether the additional horses were impounded under a second search warrant, or pursuant to §578.016 R.S.Mo.

On March 8, 2005, Respondent entered the Court's "Findings And Order". See Appendix at page A-5. In the "Findings" portion of the "Findings And Order" the Court found, *inter alia*: that by clear and convincing evidence the search warrant was valid and that the Sheriff acted properly in seizing the horses; that a misdemeanor charge, with nine (9) counts had been filed against Relator; that the Humane Society had presented bond bills in the amount of one hundred seven thousand, three-hundred and three dollars and thirty-nine cents (\$107,303.39); that there was insufficient evidence to determine that Relator was intentionally abusing the horses in issue, and that Relator had overestimated his knowledge and ability to properly care for such a large herd of horses. In the "Order" portion of the "Findings And Order" the Court ordered that the custody of the horses be given to Dr. Duke Dana in his official capacity with the Missouri Department of Agriculture; that the horses should be returned to Relator upon the condition that he present a bond or other security in the amount of sixty-five thousand dollars (\$65,000.00); that if Relator was unable or unwilling to supplied the security, Dr. Dana was authorized to sell the horses and deposit the money in the registry of the Court, and that if a Relator supply the security, the final disposition of the horses would be made after the criminal proceedings were complete.

⁷ A copy of §578.018 appears in the Appendix at A-1.

On March 15, 2005, after hearing arguments on the State's Motion To Reconsider Bond Amount, and after hearing the Missouri Attorney General's concerns about the court's assignment of the horses to Dr. Dana, Respondent entered an Amended Findings And Order. App., p. 12. The amended order altered the initial Findings And Order by providing that the custody of the horses would remain with the Sheriff of Greene County, Missouri, and that if Relator posted a bond or other security in the amount of one hundred five thousand dollars (\$105,000.00) the horses would be returned to him.

On April 8, 2005, the State of Missouri, filed a "Motion To Amend The Amended Findings And Order Of March 15, 2005". On April 12, 2005, Respondent entered a "Disposition Order" granting Humane Society of Missouri and the Carthage Humane Society "permission to humanely dispose of the horses which were placed in their care by the Greene County Sheriff after their impoundment...". App., p. 19.

On April 20, 2005, Relator applied for a writ of mandamus from the Missouri Court of Appeals for the Southern District, ordering Respondent to withdraw that portion of his order allowing for the immediate disposal of Relator's horses. On April 22, 2005, the Court of Appeals for the Southern District dispensed with issuance of a preliminary order and entered a

preemptory writ in mandamus commanding Respondent to vacate paragraph six (6) from his order of April 12, 2005.⁸

After applying for, and being denied transfer from the Court of Appeals, Respondent applied for and was granted transfer by this Court on May 26, 2005.

There is currently pending in the Circuit Court of Greene County, Missouri a criminal complaint against Relator for criminal animal abuse and criminal animal neglect. The case is captioned *State of Missouri v. William Zobel*, and assigned case number 305-CM 0907. In addition to the foregoing case, there is also a related case filed in the Circuit Court of St. Louis County captioned as *Humane Society Of Missouri v. William Zobel* and assigned case number 05CC-001113. There is also a case pending in the Circuit Court of Jasper County, Missouri captioned *Carthage Humane Society Of Missouri v. William Zobel* and assigned case number 05-AP-AC 000357. The later two cases are filed pursuant to the provisions of §430.160.

Relator's attorneys have accepted service on both of the humane society cases and intend to defend against the unreasonable charges that

⁸ A copy of the Appellate Court's Order is found in the Appendix at A-21.

are included in the liens.⁹ Once the liens cases are resolved, Relator intends to regain possession of his horses. The Court's writ of mandamus is necessary for Relator's criminal defense as well as to allow him to recover his property after the lien proceedings are complete.

⁹ The same evidence offered, and accepted by the lower court during the disposition hearing supports the lien cases. Such evidence includes the costs of such items as fencing and trailers purchased by the humane societies, as well as a charge of \$10.50 per head, per day for boarding.

POINTS RELIED UPON

I.

Relator is entitled to a writ of mandamus ordering Respondent to vacate the portion of the April 8, 2005 circuit court order that allowed the sale or disposal of Relator's horses because Respondent was without jurisdiction to order the animals sold in that such act constitutes spoliation of evidence and Relator will be irreparably harmed if his horses are sold and he will have no adequate remedy at law failing the Court's entering its writ of mandamus.

Authorities

Cases:

Baldrige v. Director of Revenue, 82 S.W.3d 212 (Mo.App.W.D. 2002)

Pomeroy v. Benton, 77 Mo. 64, 86-87 (1882)

Statutes:

§578.018 R.S.Mo.

§430.150 R.S.Mo.

§430.160 R.S.Mo.

§430.165 R.S.Mo.

II.

Relator is entitled to a writ of mandamus ordering Respondent to vacate the portion of the April 8, 2005 circuit court order that allowed the sale or disposal of Relator's horses because Respondent was without jurisdiction to order the sale or disposal of Relator's horses in that §578.018 R.S.Mo, the authority under which Respondent entered the April 8th order, is unconstitutional under both the United States Constitution and the Constitution of Missouri because, §578.018 is unduly vague in that it fails to provide sufficient guidance to avoid arbitrary and discriminatory application thereby denying Relator the equal protection of the law.

Authorities

Cases:

State v. Stokely, 842 S.W.2d 77 (Mo. 1992).

State V. Brown, 660 S.W.2d 694 (Mo. banc 1983).

In Re Care And Treatment of Norton, 123 S.W.3d 170 (Mo. 2003).

In Re Lieurance, 130 S.W.3d 693 (Mo. 2004).

Constitutions:

United States Constitution, Fourteenth Amendment

Missouri Constitution, Article I, Sec. 2, Article I, Sec. 10.

Statutes:

§578.018 R.S.Mo.

§578.009 R.S.Mo.

§578.012 R.S.Mo.

ARGUMENT

First Point Relied Upon

Relator is entitled to a writ of mandamus ordering Respondent to vacate the portion of the April 8, 2005 circuit court order that allowed the sale or disposal of Relator's horses because Respondent was without jurisdiction to order the animals sold in that such act constitutes spoliation of evidence and Relator will be irreparably harmed if his horses are sold and he will have no adequate remedy at law failing the Court's entering its writ of mandamus.

Until Respondent issued the second amended order in response to the State's motion, the events transpiring in this case were fairly typical of §578.018 proceedings. That is, the State used the warrant and impounding authorities of §578.018 to remove animals from the possession of individuals suspected of animal abuse and/or animal neglect, and thereby

secure evidence in support of a criminal prosecution under §578.009

R.S.Mo.(animal neglect) and/or §578.012 R.S.Mo.(animal abuse).

However, when, on April 8, 2005, the State filed its “Motion To Amend The Amended Findings And Order Of March 15, 2005” it presented an interpretation of the §587.018 that was a radical departure from previous practices under the statute.

Before the State’s post-hearing motion on behalf of the humane societies was filed, the generally accepted procedure was to allow the entities in possession of the seized animals (usually various humane societies) to perfect and enforce liens for the costs of the animals’ care under §§430.150, 430.160 and 430.165 R.S.Mo. Indeed, at the time the State filed its post-hearing motion, the Missouri Humane Society had filed an action in the Circuit Court of St. Louis County, Missouri¹⁰ and the Carthage Humane Society had filed an action in the Circuit Court of Jasper County¹¹ pursuant to the foregoing statutes. As argued fully below, the State’s novel action under §578.018 brings to light the statute’s lack of constitutionality. Notwithstanding Relator’s constitutional argument,

¹⁰ The action is captioned *Humane Society Of Missouri v. William Zobel* and assigned case number 05CC-001113.

¹¹ The action is captioned *Carthage Humane Society Of Missouri v. William Zobel* and assigned case number 05-AP-AC 000357.

however, he is nevertheless entitled to a writ of mandamus ordering Respondent to vacate paragraph six (6) of the order of April 12, 2005 because the circuit court is without jurisdiction to order the spoliation of evidence.

As a result of impounding some 120 to 130 of Relator's horses, the State filed criminal animal abuse charges on nine horses.¹² While the charges have subsequently been amended to include more horses, it remains uncertain as to how many and which of the horses the charges relate to. Consequently, the circuit court's order would allow the horses to be disposed of while they still possess evidentiary value to Relator's defense of the criminal charges. To the extent that photographs exist of the horses, the disposition hearing proved that reliance on the photographs was less than satisfactory. Indeed, the State introduced into evidence only thirty-four pictures of horses. (See, TT., Vol. 1, index, p. v-vi). The relative evidentiary value of the horses cannot be adequately judged at this time. However, given the numerous mistakes that were made during the impounding process, and the many confusions as to gender of many of the horses as well as other errors in recording other identifying characteristics

¹² The action is filed Greene County Circuit Court under the caption of *State v. Wm. Zobel*, and assigned Case number 305-CM 0907. The action was filed January 31, 2005.

of the horses,¹³ it is not just plausible, but likely that the availability of the horses will be necessary to Relator's defense in the criminal proceedings.

Respondent supports its application for transfer with dire warnings of the chilling effect the Court of Appeals' ruling is likely to have on "animal abuse and neglect rescues and prosecutions throughout the State of Missouri". Application For Transfer at page 10. Respondent not only overstates the case, but perhaps inadvertently points out one of the most significant issues plaguing the application of §578.018 R.S. Mo. That is, animals are being impounded without regard to the provision contained in §578.018.1(2) which states: "If no appropriate veterinarian, animal control authority, or animal shelter is available, the animals ***shall not be impounded...***". (emphasis added). In the instant case, Relator's horses were all removed from the jurisdiction of the Greene County Circuit Court. Upon impoundment, the horses were divided up and sent to Mount Vernon Missouri, Carthage Missouri, and Union Missouri. If the "availability" of a veterinarian, etc. is not limited to the jurisdiction of the court issuing the search warrant, it certainly is unreasonable to interpret the statute to include a facility over 200 miles away. The point being, any discomfiture to the operations of the humane societies involved in this matter is self-

¹³ See generally, the testimony of Wm. Zobel, TT., Vol. 4, p. 687, lines 24-25, and pp. 736 – 793.

inflicted. Moreover, impoundment is not the only method of rescue provided by §578.018 R.S.Mo. The authorized state official may also inspect and care for animals without removing them from the property. It is certainly a reasonable interpretation of §578.018 that the statute allows for humane societies, veterinarians and/or animal shelters to provide care for animals without removing them from the property. Consequently, requiring impounding officials to maintain authority over the animals, particularly when related criminal charges are pending is reasonable and necessary.

“Missouri courts have recognized the spoliation doctrine since *Pomeroy v. Benton*, 77 Mo. 64, 86-87 (1882)”. *Baldrige v. Director of Revenue*, 82 S.W.3d 212, 222 (Mo.App.W.D. 2002). The doctrine of spoliation requires a showing that the evidence was intentionally destroyed. (Id. and cases cited therein). It certainly would be an intentional act of the prosecutor to file motions that resulted in the spoliation of the evidence. In such case as the one before the Court, however, the Court holds the authority to prevent the prosecutor’s office from destroying the evidence necessary to Relator’s defense.

II.

Relator is entitled to a writ of mandamus ordering Respondent to rescind the portion of the April 8, 2005 circuit court order that allowed the sale or disposal of Relator’s horses because Respondent was without jurisdiction to order the sale or

disposal of Relator's horses in that §578.018 R.S.Mo, the authority under which Respondent entered the April 8th order, is unconstitutional under both the United States Constitution and the Constitution of Missouri because, §578.018 is unduly vague in that it fails to provide sufficient guidance to avoid arbitrary and discriminatory application thereby denying Relator the equal protection of the law.

Section 578.018 R.S.Mo. is one of several related statutes that have as their collective purpose, the protection of animals against the abuse or neglect of their owners or possessors. See, §578.005 to §578.050 R.S.Mo. Sections 578.005 to 578.012 define critical terms and provide criminal penalties for animal abuse/neglect. Section 578.018, however, relates to civil proceedings concerning the rights to enter upon land and impound abused or neglected animals. Section 578.018 also provides for a "disposition" hearing at some point after the animals are impounded. Problematic to §578.018 and relevant to these proceedings is the failure of the statute to appropriately define the circumstances under which animals may be impounded. Additionally, the statute fails to provide Relator, and all those similar situated to Relator, with any ability to protect and secure the "gains of their own industry" as guaranteed by Article I, Section 2 of the Missouri Constitution.

The first sentence of §578.018 states in full: “Any duly authorized public health official or law enforcement official may seek a warrant from the appropriate court to enable him to enter private property in order to inspect, care for, or impound *neglected or abused animals*.” (emphasis added). The term “neglected or abused animals” is nowhere defined in the statute. The terms *are* defined elsewhere in the statutory scheme (§578.009.1 R.S.Mo. and §578.012.1(1) R.S.Mo.) but the definitions are relevant only to the criminal statutes. It would be inappropriate to apply the criminal definitions to the civil act of impounding the animals lest the impoundment process become a de facto determination of the guilt of the animal owner under the criminal statutes. Section 578.018 grants the authority to impound animals on the basis of a conclusion of law that has yet to be rendered in the matter.

Relator’s argument is not simply a matter of semantics. The authority granting the relevant official the ability to impound a person’s animals, and thereby deny said person the right to his property, is subject to strict scrutiny by the Court. *In Re Care And Treatment of Norton*, 123 S.W.3d 170, 173 (Mo. 2003)(In determining whether a statute violates the equal protection clause, the Court will look to see if it impinges upon a fundamental right explicitly or implicitly protected by the Constitution). The right to possess and to keep secure one’s property is a fundamental right at least implied by Article I, Section 2 of the Missouri Constitution. To pass

the strict scrutiny review “a government intrusion must be justified by a ‘compelling state interest’ and must be narrowly drawn to express the compelling state interest at stake”. *In Re Lieurance*, 130 S.W.3d 693, 700 (Mo. 2004)(quoting *Norton, supra*).

In the instant case, the statutory scheme including §578.018, reflects the efforts of the legislature to assert the State’s police powers to protect animals against abuse and/or neglect. Assuming for purposes herein that protecting animals is a legitimate function of the state¹⁴, and that the State has a compelling interest in protecting animals against abuse, the statute must be drawn narrowly in order to enforce the state’s interest. That is to say the language of the statute must take into consideration by its language, the fundamental right upon which it infringes, and in its operation, minimize the states intrusion upon that right. Section 578.018 R.S.Mo. fails this test.

In granting the State the right to enter upon private property and “impound neglected or abused animals” it has granted the State a sledgehammer when only tweezers were required. As stated *supra*, neglect and/or abuse are ultimate determinations of law. The lack of refinement to the circumstances under which a citizen’s property may be

¹⁴ Protecting animals against abuse is a subset of a larger political issue that may be termed “animal rights”.

seized, allows for the abuse of the rights granted by the statute as well as arbitrary application of its terms. One man's abuse is another man's sick animal.

The effect of the lack of guidance by the statute is nowhere more apparent than in the instant situation. Dr. Dziuban, the veterinarian attending the seizure proceedings, testified that not all the animals impounded appeared to be abused or neglected. TT., Vol. 1, pp. 148, 150, 174, 187, 205. In addition, Dr. Dana, D.M.V., from the Missouri Department of Agriculture noted that as he approached Relator's ranch, he "[s]aw some horses, and...thought well, I'm not involved in those horses because they seemed to be pretty well kept." TT., Vol 5, p. 855.¹⁵

It is apparent by the evidence adduced at the disposition hearing that the authority granted by the statute is being abused in that the authority delegated to "public health officials or law enforcement officials" is being further delegated to interests that may not appreciate (at least to the extent of this Court) the fundamental right to own and keep property.¹⁶ See trial testimony of Mark Hall, TT., Vol. 1, p. 76. ("Q. Okay. And in

¹⁵ The horses Dr. Dana was referring to belong to Relator and were impounded.

¹⁶ The undefined right to impound is given broadly and without reservation to any "public health official".

reference to the decision as to which horses were going to be taken from the property, you testified that that was left up to Dr. Dziuban, correct? A. Yes".) See also trial testimony of Dr. Dziuban, TT., Vol. 1, page 199-200. ("A. Yes, he [Detective Hall] was for all intent and purposes my assistant.") Consequently, the failure of §578.018 to supply standards for taking animals from the possession of their owner, denies the enforcing official any guidance for its actions and thereby leaves him/her incapable of determining whether an animal should be impounded under the law. The result is that the decision to impound is further delegated and the decision becomes one that varies from veterinarian to veterinarian, from one part of the state to another, and from one person's sensibilities to another. This, by definition, is an arbitrary manner in which to exert the State's police powers.

In addition to the vagueness of the circumstances under which animals may be impounded, §578.018 fails strict scrutiny review because it does not minimize its impact on the person's property rights. The court issuing the search warrant, in this case the Circuit Court of Greene County, is mandated by the statute to hold a "disposition hearing... within thirty days of the filing of the request" by the impounding authority, which, in this

case, was the Sheriff's office of Greene County.¹⁷ Again, the statute violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and Article I, section 2 of the Missouri Constitution because the date of the hearing is not related to the date of seizure, but on the date that the request is filed by the impounding official. The alacrity with which a prosecutor's office (or other office of the state) may act to bring the matter before a court will therefore vary from jurisdiction to jurisdiction depending on arbitrary situations impacting the attention given the disposition hearing by the office.¹⁸ The arbitrary time for requiring the matter to be heard denies Relator equal protection of the law. Additionally, the resulting arbitrary timeframe for providing the animal owner a right to be heard, is not without other impact to their equal protection rights. In the instant case, the humane societies involved

¹⁷ There is no provision in 578.018 R.S.Mo. that permits the animal owner to file a request for a disposition hearing, only the impounding authority may do so.

¹⁸ The city, county or state office acting on behalf of the state in these matters would depend on the impounding authority because "public health official" is not defined by the statute and could ostensibly include any State, Federal, County, City, or other local official acting in some "public health" capacity.

sought a total of one hundred and five thousand dollars (\$105,000.00) for the first thirty (30) days it cared for the impounded horses. See Respondent's order at paragraph 3. At ten dollars and fifty cents (\$10.50) per day, per horse that the humane society was charging just for boarding, the ransom for Relator's property was increasing by some thirteen hundred dollars (\$1,300.00) per day. The increase of the amount required to get one's property back after it has been seized under §578.018 is completely out of the control of the animal owner/possessor because they have no authority to request a disposition hearing – only the impounding authority may do so.¹⁹ See, §578.018.1(1) R.S.Mo. Consequently, the statute's impingement upon the animal owner's fundamental rights are not minimized but simply ignored by §578.018 R.S.Mo.

The vagueness of §578.018 creates difficulties with the circuit court, which, again, denies Relator the equal protection of the law. A statute is unconstitutionally vague if it lacks sufficient guidance so as to avoid arbitrary and discriminatory application. *State v. Stokely*, 842 S.W.2d 77,81 (Mo. 1992)(citing *Gayned v. City of Rockford*, 408 U.S. 104, 108

¹⁹ While theoretically an animal owner could seek injunctive relief under some theory of law, the practical considerations in the instant case prevented such action. Relator's horses were immediately divided up and removed from the jurisdiction to locations as far as 200 miles away.

(1972). See also, *State V. Brown*, 660 S.W.2d 694, 697 (Mo. banc 1983)(“[T]he vagueness doctrine assures that guidance, through explicit standards, will be afforded to those who must apply the statute, avoiding possible arbitrary and discriminatory application”). Respondent in the instant matter repeatedly stated that he was unsure of the process over which he was presiding. See, e.g. TT., Vol. 6, p. 1062, lines 4-8 (“I don’t mind somebody else taking a look at this. Frankly, I’m flying without a parachute here and that always makes me uncomfortable.”) If the statute raises discomfort in such a competent jurist as the Honorable Don Burrell, it is certain to cause mischief under lesser abilities.

Undoubtedly, Respondent’s problems in conducting the disposition hearing was created by the vagueness of §578.018 as to what was to come out of the proceeding. The deceptive caption of the proceedings, “In Re search warrant issued 1/8/05” gives no notice that the proceedings (as proven by the State’s action herein) will actually morph into a due process “taking” proceeding.²⁰

²⁰ Relator is aware that due process argument is more appropriately addressed under a separate “Points Relied Upon”, however, the short briefing schedule (including a holiday weekend) requires Relator to beg some indulgence by the Court. The point is made herein with brief elaboration.

When Relator, or any similarly situated animal owner walks into court for the disposition hearing, they have no basis of belief as to anything that may occur during the proceedings. If there are no criminal charges filed at the time of the disposition hearing, the animal owner will likely not have any idea as to the evidence for impounding his/her animals. They will certainly hear for the first time the amount of money they will need to rapidly produce to protect their animals from being sold, given away, or otherwise disposed of. This lack of notice as to the nature and scope of the proceedings, and the arbitrary manner in which the court must respond to the evidence denies Relator, and similarly situated animals owners, due process and equal protection of the laws.

The greatest harm done by the vagueness of §578.018 is the failure to advise the circuit court as to the findings required by the disposition hearing. In the instant case, somewhere between 120 and 130 of Relator's horses were impounded. Uncontroverted evidence at the hearing demonstrated that not all the horses impounded showed any sign of abuse or neglect. See testimonies of Drs. Dziuban and Dana, *supra* at p.22. Nevertheless, the circuit court validated the search and seizure as to all horses. As the circuit court stated during the disposition hearing, Relator's horses are not fungible goods. TT., Vol. 5, p. 827. As a result, Relator was entitled to have a finding as to whether the impounding official demonstrated probable cause for each horse impounded as well as a

separate bond amount for each horse based upon the cost of the care for that particular horse.²¹ Such sensitivity to the fundamental right to own and keep property is required of any statute that would impinge upon that right. Section §578.018 simply fails to provide balance between the State's interest in protecting animals against abuse/neglect and the right of citizens to keep and protect the "gains of their own industry". The statute is, therefore, unconstitutional.

Finally, §578.018 is unconstitutional in that the disposition hearing is so vague in its stated intent and operation, that the appealability of the circuit court's findings and orders cannot reasonably be ascertained on the face of the statute. It is, for all intent and purpose, a pre-criminal trial proceeding. As such, there is significant question as to whether the court's finding would be appealable as an interlocutory ruling. However, if, upon

²¹ The Bond requirement under §578.018.1(3) creates an automatic offset that functions to impermissibly encumber animals that did not incur significant costs to care for during the period of its impoundment. For instance, one horse may be a very valuable thoroughbred requiring very little cost to care for while impounded. Another horse, impounded at the same time, may be very old and require a great deal of care costs. The bond, and forfeiture process prevents the owner from satisfying the bond as to the valuable horse.

review by a prosecutor it is determined that criminal charges will not be filed on any impounded animal, the circuit court's decision becomes a final order disposing of all issues related to the issuance of the search warrant. Again, the number of variables ignored by the statute demonstrates it to be unconstitutionally vague.

Conclusion

The disposal by the humane societies of the horses now in their possession will deprive Relator of their evidentiary value in a pending criminal action. There is no adequate substitute for the horses as presently the criminal charges refer to the horses in such an ambiguous manner (using its own reference system) that Relator has yet to determine on which of the horses the criminal charges are based. It was demonstrated at the disposition hearing that Dr. Dzuiban, incorrectly made fundamental identification characteristics such as the sex of the horse, at the time the horses were impounded. Relator must be able to have access to his own property for purposes of defending himself against criminal charges involving that property. Notwithstanding the humane societies' charges for their care, Relator has a superior right of ownership of the animals.

Section 578.018 R.S.Mo. is unconstitutional under both the Missouri Constitution and the U.S. Constitution. On its face, and in its application,

§578.018 is vague and denied (denies) Relator the equal protection and due process rights that inherent and necessary to the fundamental right to possess property.

Relator prays the Court enter an order ruling that §578.108 is unconstitutional and is, therefore, stricken from the law and order such remedy to Relator as may be appropriate under the Court's ruling. In the alternative, Relator prays the Court make permanent the writ of mandamus previously entered by the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.04 and that the brief contains 5,077 words.

The undersigned further certifies that the discs simultaneously filed with the briefs have been scanned and are free from viruses.

Dale L. Ingram

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief, and documents including the appendix found bound here within, as well a one floppy disc, was mailed via first class mail, postage prepaid to:

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